## RESPONSE TO COMMENTS FROM THE 45-DAY NOTICE

PUBLIC HEARING, February 14, 2001
At the public hearing, Chuck White presented oral comments identical to written comments one through four also submitted by Chuck White.

Comment 1: Several commentors (1, 2, 3, ...22) requested that provisions of the Cal/EPA Policy be clearly incorporated into these regulations or an unambiguous commitment be made to incorporate them into parallel regulations dealing with the "settlement" phase of penalty negotiations. As an interim alternative, the commentors requested that proposed Section 66272.68(a) be modified to add category entitled "Self-Reporting of Violations" which would have a downward adjustment of up to not less than 90 percent - consistent with the Cal/EPA Policy.

Response: The Cal/EPA policy is currently under review. The Department of Toxic Substances Control (DTSC) will reconsider this request when Cal/EPA revises its policy. Codifying the policy would delay the adoption of the proposed rulemaking package significantly. The overwhelming majority of violations are found during inspections performed by DTSC, not through self-disclosures. Thus, postponing the adoption of these regulations while waiting to address self-disclosed violations would be unnecessarily burdensome to most members of the regulated community. Meanwhile, self-disclosed violations will continue to be handled on a case-by-case basis. No change is proposed on the basis of this comment.

Comment 2: Several commentors (1, 2, 3, ... 22) requested that the proposed penalty structure be modified to result in penalties that are no larger than those historically imposed by DTSC for the same types of violations. The commentors also suggested that further reasonable penalty relief should be provided for hazardous waste violations in California that are not considered hazardous waste violations under federal law.

Response: The commentors provided no proof to substantiate this statement. When comparing penalties assessed historically with those assessed after adoption of the emergency Assessment of Administrative Penalties regulations, DTSC sees no evidence that penalties are higher than those assessed under DTSC "Policy for Determining Civil and Administrative Penalties," dated December 1993 or subsequent regulations. The dollar figures found in the initial penalty matrix were derived by combining the matrices in the U.S. EPA "Resource Conservation and Recovery Act (RCRA) Civil Penalty Policy," dated October 1990 and DTSC "Policy for Determining Civil and Administrative Penalties." Although the amounts in the proposed regulations are occasionally higher than those listed in U.S. EPA's penalty policy, the amounts are consistent with or lower than those in DTSC policy and regulations in effect between 1987 and December 13, 2000.

The multiday penalty approach presented in the proposed regulations is very similar to the U.S. EPA approach and proposed amounts are exactly the same as those published in the

"RCRA Civil Penalty Policy," with the exception of a lower amount in the minimal-harm/minimal-deviation category. However, the U.S. EPA's penalty amounts for both initial penalties and multiday penalties are actually higher than those published because the U.S. EPA has added a ten percent inflation factor to all amounts. Notwithstanding those considerations, DTSC decided to propose an alternate method for calculating multiday penalties. Please see response to comment number 5.

Although there are differences between some requirements concerning the management of RCRA and non-RCRA waste, neither the Legislature nor DTSC has drawn a distinction between the two for the majority of requirements imposed under the law. For example, the requirement to obtain a permit for the treatment, storage or disposal of RCRA and non-RCRA waste is the same. DTSC sees no reason why a lower penalty should apply for treating non-RCRA waste without a permit. Both pose a hazard to human health and the environment and should be treated accordingly. No change is proposed on the basis of this comment.

Comment: 3. Several commentors (1, 2, 3, ... 22) requested that DTSC reconsider an approach that bases the proposed penalty on the degree of harm that the violation actually causes rather than some abstract speculation about a "potential harm". The commentors also suggested that at a minimum, DTSC should include a factor to limit potential harm to harm that is clearly documented by DTSC to have actually occurred under the same or similar violative conditions elsewhere.

Response: As stated in the "Initial Statement of Reasons," the Hazardous Waste Control Law is preventive in nature. Accordingly, the December 29, 2000 proposed regulations explain that in assessing penalties for a violation, the Enforcement Agency will consider the same factors for actual and potential harm, whether or not harm actually occurred. DTSC finds support for this decision in Section 25110.8.5 of the Health and Safety Code which defines a Class I violation, the most serious violation that can be committed, as any deviation that could result in a failure to ensure that hazardous waste is destined for, and delivered to, an authorized facility; prevent releases of hazardous waste; ensure early detection of releases of hazardous waste; ensure adequate financial resources to pay for facility closure; or perform emergency cleanup operations of, or other corrective actions for, releases. As defined, no actual harm must occur in order for a violation to be categorized as a Class I violation.

Additionally, the same philosophy of prevention is evident in the Federal RCRA program. In the "RCRA Civil Penalty Policy," dated October 1990, the U.S. EPA states,

> "... when considering the risk of exposure, the emphasis is placed on the potential for harm posed by a violation rather than on whether harm actually occurred. The presence or absence of direct harm in a noncompliance situation is something over which the violator may have no control. Such violators should not be rewarded with lower penalties simply because the violations happened not to have resulted in actual harm."

No change is proposed on the basis of this comment.

Comment 4: Several commentors (1, 2, 3, ... 22) expressed concern that the draft proposed regulations provide an upward adjustment for a poor compliance history - without any similar downward adjustment for a good compliance history and that this provision should go both ways. However, the undersigned believe that this concern could be satisfactorily addressed by incorporating the Cal/EPA policy discussed above (Unified Cal/EPA Policy on Self-Evaluation, dated December 15, 1998) into the proposed regulations.

Response: DTSC agrees that an adjustment for good compliance history would be appropriate. Accordingly, DTSC is proposing that the total base penalty may be decreased by five percent for each previous consecutive Enforcement Agency inspection report that has had no violations noted, up to a total reduction of ten percent. A separate, additional downward adjustment of 15 percent may be granted if the violator has a current International Organization for Standardization (ISO) 14001 Certificate. No further change is proposed on the basis of this comment.

Comment 5: One commentor (23) remained concerned about the applicability of multiday violations and multiple violations under the current proposal. This commentor noted that DTSC's original policy stated that multiday penalties should only be assessed in three types of situations: 1) when continued noncompliance poses a continued major threat of harm or continued major deviation from regulatory standards, 2) where the economic benefit of continued noncompliance exceeds the statutory maximum for a single day, or 3) where the violator refuses to return to compliance. He said the current proposal still makes it more likely that DTSC will assess multiday and multiple violations. The commentor said proposed Section 66272.65 defines when multiday penalties are to be both 'presumed' and 'mandatory', which is a change in policy from the broader discretion previously exercised by DTSC under the original policy when determining whether or not to assess a multiday penalty. Finally, he said that currently, DTSC infrequently considers the same violation that has continued for multiple days to be separate violations, however, the current proposal creates a mandatory and complex process for assessing penalties for multiday and multiple violations.

Response: The December 29, 2000 proposed regulations allow much more flexibility for the assessment of a single initial penalty for multiple violations than DTSC's "Policy for Determining Civil and Administrative Penalties, " dated December 1993. The policy required that all instances of Class I violations be cited as separate violations. No mandatory process for assessing multiple initial penalties for multiple violations is included in the proposed regulations.

The December 29, 2000 proposal does differ from DTSC's "Policy for Determining Civil and Administrative Penalties," dated December 1993, in the assessment of multiday penalties. However, it was never the intention of DTSC to codify DTSC's penalty policy verbatim.

Notwithstanding those considerations, DTSC decided to propose that, for days following the first day of violation, the multiday component of the penalty be calculated by determining two percent of the initial penalty and multiplying that value by each and every additional day the violation occurred after the initial day. This method removes the complexity of determining what presumed and discretionary days to include in the penalty calculation. It also more appropriately imposes a penalty for each day a violation occurs. Finally, this method results in lower penalties which, in most cases, more accurately reflect the gravity of the violations. However, DTSC will still examine the final penalty and adjust it to ensure that the penalty is sufficient to provide a prophylactic effect on both the violator and the regulated community as a whole, pursuant to Section 66272.68.

Using the method prescribed in the December 29, 2000 proposal, the multiday penalty for a violation lasting for 42 days, with a $10,500 initial penalty would be $38,850. Utilizing the two percent calculation would result in a multiday penalty assessment of $8,820. Similarly, a major potential harm-major deviation violation with an initial penalty of $25,000 that occurred for 180 days, would result in a $537,000 multiday penalty under the December 29, 2000 proposal and a $89,500 multiday penalty using the newly proposed method.

Comment 6: One commentor (23) stated that the current regulatory proposal provides less discretion than the original penalty policy. He found this proposal's reduction in discretion in the penalty assessment phase particularly troubling, and believes it may make it more difficult for DTSC to negotiate settlements with parties who have allegedly violated the hazardous waste regulations.

Response: The commentor does not explain how reducing discretion will make it more difficult to reach settlements with persons who violate hazardous waste control laws. As explained in the "Initial Statement of Reasons," the purpose of the proposed regulations is to provide a standard and systematic approach to the assessment of administrative penalties. The regulations also provide a practical method for DTSC and Certified Unified Program Agencies (CUPAs) to determine an appropriate penalty allowing for professional judgment while maintaining statewide consistency. It is the search for such consistency that has resulted in a reduction in discretion. The phase of negotiating a settlement is outside the scope of the proposed regulations and remains unaffected by these regulations. No change is proposed on the basis of this comment.

Comment 7: One commentor (24) stated that in accordance with Health and Safety Code (HSC) 25180(d), this paragraph (Section 66272.60(c)) requires DTSC to determine at each step whether the person being assessed the penalty is being treated equally and consistently with regard to the same types of violations assessed against other violators. The commentor recommended that the regulation include guidelines to describe the manner in which this determination is to be made. Moreover, the commentor recommended that the regulation require this determination to be shared with the alleged violator upon request.

Response: DTSC believes the adoption of these regulations will ensure that violators

being assessed a penalty will be treated equally and consistently by requiring a consistent method for assessing penalties. No change is proposed on the basis of this comment.

Comment 8: One commentor (24) requested that DTSC clarify the meaning of "requirements with more than one part." The commentor asked if this referred to a single regulatory section with multiple subparts, a violation of several interconnected regulatory sections by a single occurrence, or another specific subsection with various requirements.

Response: As explained in the "Initial Statement of Reasons," requirements with more than one part include all requirements that can be included under one main requirement. An example of a requirement with more than one part is the requirement for all owners and operators of hazardous waste facilities to have a contingency plan as set forth in Title 22, California Code of Regulations (22 CCR), Section 66264.50 through Section 66264.56. Each section of the regulations outlines a separate requirement, yet all the specific requirements are part of the larger requirement to have a contingency plan. DTSC believes this explanation is sufficiently clear. No change is proposed on the basis of this comment.

Comment 9: One commentor (24) stated that Section 66272.63 generally provides in paragraph (c) that the initial penalty shall be increased by the amount of any economic benefit gained by the violator as a result of noncompliance up to the statutory maximum for each violation and that the same paragraph includes a description of five types of economic benefits; (1) avoided costs, (2) delayed costs, (3) increased profits, (4) having the use of capital, and (5) avoided interest.

The commentor stated this section is analogous to EPA's Clean Air Act policy to recover economic benefits from violators and requires DTSC regulators to consider a number of factors when arriving at an appropriate penalty, including the economic benefit gained as a result of the violation.

The commentor suggested DTSC's plan to recover economic benefit from violators should exclude Federal facilities, because: (1) Federal facilities do not compete with private businesses; (2) Federal facilities do not earn a profit, therefore they cannot have increased profits like a private business; (3) Federal facilities have budgets which are authorized by Congress, therefore they do not gain a business advantage by having the use of capital; (4) Finally, avoided interest has no economic value to the federal government since it is prohibited from investment, therefore, avoided interest should not be considered when determining a penalty.

Additionally, the commentors noted that DTSC has not included Supplemental Environmental Projects (SEP) within the framework of the regulations and recommended that DTSC add a final section to implement its SEP policy.

Response: DTSC disagrees that these regulations should exempt Federal facilities from repaying any economic benefit derived from violations. Operating a facility without a permit results in an economic advantage by avoiding the cost of obtaining a permit,

regardless of whether or not the violator is a Federal facility.

SEPs are not considered in the proposed rulemaking package because they are not part of the penalty assessment process. SEPs are sometimes negotiated in the course of settlement and will be considered by DTSC on a case-by-case basis.

Comment 10: One commentor requested that Section 66272.65 should incorporate requirements to properly implement HSC 25185(c). The commentor stated that "to our detriment we have run into issues in the field on more than one occasion where DTSC's personnel have failed to meet the timeliness required therein by significant periods of time." Because of this, the commentor is concerned that no consequences for DTSC's failure to comply with HSC Section 25185(c)(3) are built into this section and that DTSC's compliance with HSC Section 25185(c)(3) is extremely important so that the respondent's rights are properly safeguarded. Specifically, protracted delays by DTSC can result in the unavailability of witnesses and the loss of evidence important to the respondent's defense. In accordance with HSC 25185(c)(3), therefore, the commentor urged that this section expressly prohibit DTSC from assessing continuing violation penalties where it has failed to timely respond to the violator's response to the inspection report and this prohibition should run from the date of inspection to the time a reply to the response to inspection report is finally provided by DTSC. Moreover, the commentor recommended that if DTSC does not respond to the response to inspection report, a continuing day violation penalty may not be assessed. In summary, the commentor requested clarification to the continuing violation penalty suspension period described in the statute.

Response: Section 66272.65 of the proposed regulations already states that if the Enforcement Agency fails to respond in a timely manner to the violator's written response to an inspection report, the Enforcement Agency may not seek penalties for continuing violations in accordance with Health and Safety Code Section 25185(c)(3). No change is proposed on the basis of this comment.

Comment 11: One commentor (24) stated that he understood that the multiday penalty is, itself, a factor used to adjust or augment the base penalty. The commentor, therefore, believes that the statement "each day the violation continues is a separate and distinct violation" will lead to the misconception that the multiday penalty may be treated by DTSC like a base penalty, in that adjustment factors may be applied to each day of the multiday penalty. The commentor does not believe this was DTSC's intent and request clarification in that regard.

Response: The multiday penalty is not a factor used to adjust or augment the base penalty; it is a component of the base penalty. As stated in Section 66272.67(b), "The base penalty for multiday violations is the adjusted initial penalty for the first day of violation determined pursuant to Sections 66272.62 and 66272.63 plus the penalty for the additional days of violation pursuant to Section 66272.65." Clarification is made in Section 66272.68 that adjustments can only be made to the total base penalty. Therefore, no misconception that the multiday penalty may be treated by DTSC as a base penalty will

occur. No change is proposed on the basis of this comment.

Comment 12: One commentor (24) recommended that a final sentence be added to Section 66272.66: “The written findings shall be made available to the alleged violator when the penalty demand is served.”

Response: DTSC does not intent to waive the attorney-client privilege for penalty worksheets. The rationale for a penalty is presented in testimony in the hearing if an order is appealed. No change is proposed on the basis of this comment.

Comment 13: One commentor (24) was concerned that minor violations (i.e., “house-keeping” violations) may inappropriately escalate a penalty assessment. Therefore, the commentor recommended this section be clarified or otherwise limited to a “serious” history of noncompliance.

Response: A minor violation, as defined in statute, would neither be included in any enforcement action nor considered when assessing an upward adjustment for compliance history. For all other violations, it was assumed that DTSC would consider the gravity of prior violations and adjust the penalty upwards as warranted. DTSC will include clarification within the “Final Statement of Reasons” concerning the upward adjustment of the total base penalty due to poor compliance history. No changes are proposed on the basis of this comment.

Comment 14: One commentor (24) requested that the sentence be added to Section 66272.68(c)(3) to reflect longstanding DTSC policy (ERP, Self Evaluation), “The same or substantially similar previous violations should only be considered if they occurred within three years prior to the last date of occurrence of the present violations.” In this regard, the commentor also requested that the requirement to analyze a five-year compliance history be modified to three years; as EPA stated in its policy, this strikes an equitable balance between the need to treat responsible companies with fairness against the need to ensure unlimited amnesty is not given to repeat offenders.

Response: According to the "Enforcement Response Policy" (EO-95-004-PP), the time period between violations is used to classify types of violators. A significant non-complier (SNC) is a violator who repeats the same Class II violation or commits a second Class I violation within three years. The “Cal/EPA Policy on Incentives for Self-Evaluation” (Self-Evaluation Policy) uses a time period of five years when classifying repeat violations that have been committed by a facility’s parent organization. Five years is also the period of the statute of limitations. The time frame of five years was chosen because DTSC believes that a longer period of time is needed to properly determine a violator’s compliance history. No changes are proposed on the basis of this comment.

Comment 15: One commentor (24) stated that historically, DTSC has withheld its penalty analyses under attorney-client privilege, making it very difficult for the alleged violator to learn the penalty amount and rationale for each alleged violation. In other words, the

alleged violator has little information to determine the reasonableness of the assessment, and is therefore, unreasonably handicapped in discussions with DTSC and, ultimately, in its ability to question the magnitude of the penalty. The commentor said this approach contrasts with that of the U.S. EPA as the latter requires its enforcement complaints assessing a penalty to contain: a concise statement of the factual basis for the alleged violation and the amount of the civil penalty. See 40 CFR 22.14(a). The commentor added, “in practice, EPA provides a detailed rationale and penalty breakdown in the complaint for EACH alleged violation,” and strongly urged DTSC to adopt this approach.

Response: See the response to comment 12. No change is proposed on the basis of this comment.